80570-9

NO. 80570-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:

JOHN L. STRAND,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

John Strand seeks review of the Division II decision affirming his civil commitment as a Sexually Violent Predator (SVP). The SVP commitment statutes require that after a court has determined that there is probable cause to believe an individual is a sexually violent predator, the individual must submit to a psychological evaluation.

In this case, Mr. Strand challenges a psychological evaluation conducted before a determination of probable cause. He alleges that the use of statements from the evaluation, and his attorney's failure to object to use of the evaluation during his commitment trial amounted to ineffective assistance of counsel. Mr. Strand also argues that the lack of a tape recording of the testimony of his expert witness deprived him of his right to be tried by a court of record, due process and appeal.

Mr. Strand's arguments fail, in that the Court of Appeals correctly determined that Mr. Strand voluntarily submitted to the evaluation, his statements were non-incriminating and voluntary, his attorney's failure to object to the evaluation did not amount to ineffective assistance of counsel, and the reconstructed testimony of Mr. Strand's expert testimony did not deprive Mr. Strand of his right to be tried by a court of record, his right to due process, or his right to appeal.

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II. ISSUE PRESENTED FOR REVIEW

A. **Is review by this Court appropriate where the Court of Appeal's determined that the trial court properly allowed the information obtained at the pre-petition evaluation when Mr. Strand consented to the evaluation, failed to preserve any error for appeal, and the evaluation did not implicate any constitutional errors?**

B. **Is review by this Court appropriate where the Court of Appeal's correctly determined that the statements by Mr. Strand at the pre-petition evaluation were non-incriminating and voluntary when Mr. Strand consented to the evaluation and denied any sexual contact with the alleged victims?**

C. **Is review by this Court appropriate where the Court of Appeal's correctly determined that Mr. Strand was provided effective assistance of counsel when it is not likely that the court would have sustained an objection to inclusion of the evaluation?**

D. **Is review by this Court appropriate where the Court of Appeal's correctly determined that Mr. Strand has no constitutional right to a verbatim report of proceedings, the reconstructed narrative record was sufficient, and Mr. Strand failed to take steps to complete the record thereby waiving any objection?**

III. STATEMENT OF THE CASE

On February 7, 2005, while Mr. Strand was serving a 150-month sentence for first degree child molestation of a 4-year old girl, the State filed a petition alleging that Mr. Strand was a sexually violent predator (SVP) as defined in RCW 71.09. CP at 11-12, 109. The petition, accompanied by a certification for determination of probable cause, relied in part, on a January 5, 2004, mental health evaluation conducted by Dr. Kathleen Longwell pursuant to RCW 71.09.025. CP at 104. At the January 5, 2004 evaluation, Dr. Longwell informed Mr. Strand that the

interview was not confidential and that the State could use the information gathered against him in a SVP case. After receiving that information, Mr. Strand signed a consent form agreeing to the evaluation. CP at 104. During the evaluation Mr. Strand denied committing any sex crimes or having any sexual interest, contact or fantasies involving children. CP at 124-125, 129.

On May 16, 2005, the trial court found probable cause that Mr. Strand was a SVP. RP at 11-12 (5/16/05)[1]. After the finding of probable cause, and in accordance with the trial court's order directing an evaluation pursuant to RCW 71.09.040(4), Dr. Longwell met with Mr. Strand a second time on November 8, 2005. RP at 128 (1/31/06).

At trial, the State put forth the testimony of A.W., M.K., A.M., Ms. Banks, the mother of an alleged victim that was not available to testify, and Dr. Longwell. CP at 95, 109; RP at 23 (1/30/06); RP at 29-30, 38-40, 51-52, 62, 68-78, 83, 114-121 (1/31/06). The state also offered the testimony of M.L. and her mother. M.L. is the 4-year old Mr. Strand was convicted of molesting.

A.W. testified that when she was nine, Mr. Strand pulled her into the back bedroom of a duplex and massaged her between her legs and on her vaginal area while he was attempting to pull down her shorts. PR at 38-40 (1/31/06). For this incident Mr. Strand pled guilty to lewdness.

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[1] The verbatim report of proceedings is not numbered chronologically for Mr. Strand's entire SVP trial. Instead, it is numbered chronologically only by day of proceeding and/or trial. Accordingly, Respondent will refer to the record by the page of the proceedings and the date on which they occurred.

M.K., A.M., and Ms. Banks testified to similar incidents of sexual communication and molestation by Mr. Strand that had not been the subject of a criminal trial and conviction.

Dr. Longwell testified that during her pre-petition and post-petition interviews with him, Mr. Strand had categorically denied committing any sex offenses. RP at 176 (1/31/06). Dr. Longwell testified that while she could not totally discount Mr. Strand's denial of wrongdoing, neither could she negate his extensive record of offenses simply based upon the fact that he denied committing them. RP at 162 (1/31/06). Dr. Longwell diagnosed Mr. Strand with three mental abnormalities: (i) pedophilia, (ii) alcohol dependence, and (iii) antisocial personality disorder. RP at 136 (1/31/06). Dr. Longwell testified that in her professional opinion, Mr. Strand's pedophilia causes him serious difficulty controlling his behavior, and makes him likely to engage in predatory acts of sexual violence. RP at 164-165 (1/31/06).

Mr. Strand was the final witness called by the State. RP at 127 (2/1/06). During his direct examination, Mr. Strand denied committing sexual acts with any of the victims, but admitted to being in the same locations as them.

As his only witness, Mr. Strand called Dr. Theodore Donaldson, a psychologist. RP at 6 (2/6/06). Due to human error, the recording device in the courtroom was not activated during Dr. Donaldson's testimony, and the testimony was not preserved. RP at 2 (2/2/06). The error was discovered and brought formally to the parties' attention on February 6,

2006. RP at 5-6 (2/6/06). Upon questioning by the trial court, both parties indicated that there had been no significant objections during Dr. Donaldson's testimony. RP at 6-7, 14 (2/6/06). Though Mr. Strand's attorney indicated informally she would be moving for a mistrial, she never made a motion for a mistrial to the trial court. RP at 8 (2/6/06). After conferring with the parties, the trial court determined that the case would proceed forward to allow the jury to make a determination as to whether Mr. Strand was a sexually violent predator. RP at 16 (2/6/06).

The jury determined that the State had proven beyond a reasonable doubt that Mr. Strand is a sexually violent predator. RP at 54 (2/6/06), CP 9-10. The trial court then ordered the parties to prepare a reconstructed record of the missing testimony of Dr. Donaldson. RP at 54-55 (2/6/06).

On March 2, 2006, the parties met to formally reconstruct the record. RP at 4 (3/2/06). Mr. Strand brought a motion for a new trial based on the failure of the court to record the testimony of Dr. Donaldson. RP at 5 (3/2/06), CP at 39. Mr. Strand also submitted objections to the State's proposed narrative report of proceedings, the majority of which were incorporated into the record. CP at 44. After reconstructing the record, the trial court denied Mr. Strand's motion for a new trial. RP at 38-40 (3/22/06).

Mr. Strand appealed. The Court of Appeals affirmed Mr. Strand's commitment as a SVP. *In re Detention of Strand v. State*, 162 P.3d 1195 (2007). In affirming the commitment, the Court of Appeals held that Mr. Strand consented to the pre-petition evaluation and failed to preserve the

error for appeal. *Id.* at 1199. Based on these facts, the Court determined that it could not consider whether the pre-petition evaluation was an error unless it was a manifest error affecting a constitutional right. *Id.* The Court then went on to determine that because there is no constitutional right to counsel at a psychological evaluation and Mr. Strand did not incriminate himself during the evaluation, Mr. Strand failed to demonstrate that there was a manifest error affecting a constitutional right. *Id.* The Court also dismissed Mr. Strand's claim of ineffective assistance of counsel stating that the trial counsel's decision not to contest the State's pre-petition evaluation and failure to request a voluntariness hearing on the admissibility of Mr. Strand's statements to Dr. Longwell was not objectively unreasonable and the decision to testify at trial ultimately rests with the Defendant, and therefore, Mr. Strand was provided effective assistance of counsel. *Id.* at 1199-1200. The Court dismissed Mr. Strand's claim that he should get a new trial because the testimony of his expert witness was inadvertently not tape recorded. *Id.* at 1200. The Court noted that the parties agreed that there were no significant objections raised during his expert witness's testimony, the parties and Court reconstructed the testimony of the expert, and Mr. Strand failed to take any steps to complete the record. *Id.*

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IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court Of Appeals Correctly Determined That Mr. Strand's Challenges To The Use Of Information From The Pre-Petition Evaluation Did Not Raise A Manifest Error Affecting A Constitutional Right.

Mr. Strand contends the Court of Appeals improperly held that he was not entitled to counsel during the psychological evaluation conducted prior to the State submitting the Petition for Determination of Probable Cause. The Court of Appeals decision involved a straightforward application of the law to the facts of this case, which fully comports with the prior decisions of the Court and the courts of appeal.

Mr. Strand asserts that RCW 71.09 permits an evaluation only after the initiation of formal SVP proceedings and the attachment of the right to counsel. Petition at 6-11. In reality, RCW 71.09 separately addresses two types of mental evaluations: those conducted pre-petition, and those conducted post-petition. With respect to pre-petition evaluations, RCW 71.09.025 requires that "when it appears a person may meet the criteria of a sexually violent predator," referral must be made to the prosecuting attorney. RCW 71.09.025(1)(b) lists the information which must be provided to the prosecutor at the time of the referral, including:

> (iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person;
>
> . . . and;
>
> (v) A current mental health evaluation or mental health records review.

The statutory requirement to send the mental health evaluations to the prosecutor is separate and distinct from the post-petition evaluation process, set forth in RCW 71.09.040. After the petition is filed, if the judge determines that probable cause exists that the person is a sexually violent predator, the judge directs that the person be taken into custody. RCW 71.09.040(1). At that point, RCW 71.09.040(2) states that the individual shall be evaluated to determine whether the individual is a sexually violent predator.

With virtually no analysis, Mr. Strand contends that the Court of Appeals ruling with respect to the pre-petition evaluation conflicts with *In re Detention of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002) and *In re Detention of Meints*, 123 Wn. App. 99, 96 P.3d 1004 (2004). Neither case is relevant to this case. Rather, in *Williams* and *Meintz*, the issue was whether additional mental health evaluations could be ordered, pursuant to Civil Rule (CR) 35. This Court ruled that the Legislature specifically stated in RCW 71.09 when evaluation is permitted and given the express provisions in the statute, it would be inappropriate to infer that additional evaluations can be ordered pursuant to CR 35. *Williams,* 147 Wn.2d at 491. The *Meints* case followed the holding in *Williams*. *Meints,* 123 Wn. App. at 104. Mr. Strand's case does not involve mental health evaluations beyond those specifically listed in RCW 71.09.

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1. Courts have consistently held that there is no constitutional right to counsel at a psychological evaluation and therefore this case does not raise a significant question of constitutional law.

Mr. Strand asserts that he has a constitutional right to counsel at the pre-petition evaluation. Courts have consistently held that there is no right to counsel at psychological evaluations. The issue was first considered by the Washington Supreme Court in *In re Petersen,* 138 Wn.2d 70, 92, 980 P.2d 1204 (1999). There, the offender argued that RCW 71.09.050(1)'s grant of the right to counsel "at all stages of proceedings" in SVP cases must be read to confer a right to counsel at any evaluation conducted pursuant to RCW 71.09.090. The court rejected this argument, holding that in the absence of "a clear declaration from the Legislature," there is no right to counsel during statutorily mandated post-commitment psychological evaluations. *Id.* The Court determined that 71.09.050 was not a blanket "overarching statutory grant of the right to counsel at all stages of all proceedings, under the entire chapter." *Id.* at 1216.

The Court of Appeals has consistently applied this Court's ruling. Recently, the Court of Appeals considered the question of whether an individual was entitled to the presence of counsel at a statutorily mandated psychological evaluation pursuant to RCW 71.09.040. *In re Detention of Kistenmacher,* 134 Wn. App. 72, 79, 138 P.3d 648 (2006). There the Court found that there is no constitutional right to counsel at psychological evaluations conducted in the course of SVP proceedings. *In re Detention*

of Kistenmacher, 134 Wn. App. 72, 73, 138 P.3d 648 (2006), *review granted*, 159 Wn.2d 1019 (2007).

As the Courts have consistently found that there is no constitutional right to have an attorney present at SVP psychological evaluations, the Court of Appeals correctly found that the absence of an attorney at Mr. Strand's pre-petition evaluation did not raise a manifest error affecting a constitutional right.

2. The Court of Appeals did not error in determining that the Fifth Amendment does not apply in this case.

There is no constitutional right to remain silent within the context of the SVP proceeding. *In re Young,* 122 Wn.2d 1, 51-52, 857 P.2d 989 (1993); *Peterson,* 138 Wn.2d at 91-92. The Fifth Amendment is only applicable in the context of Mr. Strand's vulnerability to future criminal liability.[2] *Id.* "The Court has refused to apply the privilege to civil cases . . ." *Young* 122 Wn.2d at 51 (citations omitted.)

Despite the fact that this Court has held that the Fifth Amendment does not apply to these types of proceedings, Mr. Strand argues that his Fifth Amendment and Fourteenth Amendment rights were violated because he was denied counsel at the pre-petition psychological evaluation. Petition at 8-9. He claims that had he had counsel, he would

[2] In his petition, Mr. Strand argues that he had a constitutional right to remain silent under the Fifth and Fourteenth Amendments to the U.S. Constitution because he was at risk of prosecution for uncharged offenses. Petition at 8. As the Fourteenth Amendment does not directly provide a right to remain silent, but is the mechanism in which the Fifth Amendment's right to remain silent is imposed on the states, this Response will only address the Fifth Amendment right to remain silent.

have been advised to remain silent and that he would not have been committed as a SVP. As Mr. Strand had no constitutional right to remain silent at his pre-petition evaluation, the Court of Appeals properly held that the denial of counsel did not deny him his Fifth Amendment Rights.

As the Court of Appeals correctly noted, even if the Fifth Amendment did apply, the Fifth Amendment only prohibits testimony that is compelled and incriminating. *Brown v. Walker*, 161 U.S. 591, 598, 16 S. Ct. 644, 40 L. Ed. 819 (1896). There is absolutely no evidence that Mr. Strand was compelled or required to participate in the RCW 71.09.025 psychological evaluation. RP at 104. Furthermore, his statements during the evaluation were not compulsory or coerced.[3]

Mr. Strand was informed that the interview and evaluation were not confidential, and that information that he provided could be used against him in the SVP case. CP at 104. After being notified of this, Mr. Strand signed a form consenting to be interviewed by Dr. Longwell. *Id.* Mr. Strand was not under any court order to participate in the evaluation, and the purpose of the evaluation was not to gather information for an uncharged crime, but for diagnosis, risk assessment, and sex offender treatment under RCW 71.09, a civil statute.

The Court of Appeals followed the decisions of this Court and the United States Supreme Court, that a Fifth Amendment violation exists only if there is a "'realistic threat of self-incrimination.'" *State v. King,*

[3] It is important to note that the evaluation was conducted by Dr. Longwell, who is a mental health provider, not a law enforcement officer.

130 Wn.2d 517, 524, 925 P.2d 606 (1996) quoting *Minnesota v. Murphy,* 465 U.S. 420, 427, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). Mr. Strand did not make any incriminating statements. On the contrary, throughout the evaluation Mr. Strand categorically denied any sexual misconduct and made no self-incriminating statements. CP at 124-125; RP at 176 (1/31/06). Nor does he identify what abuses may have been cured by the presence of counsel. The only "abuse" Mr. Strand claims is that he made statements during the psychological examination that contributed to Dr. Longwell's conclusion that Mr. Strand appeared to meet the definition of a SVP. Mr. Strand does not allege the statements were coerced, that Dr. Longwell used improper interview techniques, or that she misrepresented his statements.

Since Mr. Strand was not compelled and did not make any incriminating statements, the Court of Appeals properly concluded that Mr. Strand's Fifth Amendment rights were not violated. The Court of Appeals decision was a proper application of the law to the specific facts presented by this case. The decision tightly followed the decisions of this Court and the United States Supreme Court.

3. Mr. Strand was not deprived of his right to not be disturbed in his private affairs without the authority of law.

As the State had the statutory authority under RCW 71.09.025 to conduct a mental health evaluation prior to the probable cause

determination, Mr. Strand was not deprived of his right to not be disturbed in his private affairs without the authority of law.

As to disclosure warnings, Mr. Strand was told prior to voluntarily participating in the evaluation that any statements he made could be used at his SVP commitment trial. CP 104. Mr. Strand does not argue that he did not understand the warning provided, or that he did not voluntarily provide the statements. As Mr. Strand was advised that his statements could be used against him and he was not entitled to counsel at the evaluations, no further warnings were necessary. CP 104; *Supra* Despite the warning he received, Mr. Strand now argues that he was entitled to *Miranda* warnings prior to participating in the evaluation.

Miranda warnings are only necessary when there is a custodial interrogation by the State. *State v. Warner*, 125 Wn.2d 876, 883, 889 P.2d 479 (1995). An interrogation must involve some degree of compulsion by a state agent. *Id.* at 885. Psychological compulsion is not enough to establish "custody" for *Miranda* purposes. *Id.* (court-ordered group therapy sessions conducted by counselors during which defendant disclosed other victims were not custodial interrogations subject to *Miranda*.); *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992) (Interview by Department of Corrections psychologist for purposes of determining classification was not custodial.)

The facts in this case do not support Mr. Strand's claim that *Miranda* warnings were warranted. There was no compulsion, and no custodial interrogation. Having failed to show that the evaluation was

conducted without the authority of law, and that Mr. Strand was entitled to more "warning" prior to the evaluation, Mr. Strand has failed to demonstrate a manifest error of constitutional law.

B. The Court Of Appeals Correctly Determined That Mr. Strand Was Not Entitled To A Voluntariness Hearing.

Mr. Strand claims that the trial court should have held a voluntariness hearing to determine the admissibility of his statements. Petition at 11-12. Mr. Strand did not request a voluntariness hearing at his SVP trial, and there is no mechanism for a voluntariness hearing in the SVP commitment hearing context. Mr. Strand cites *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 98 (1964), for the proposition that he is entitled to a hearing to determine whether his statements are voluntary. Petition at 12. However, *Jackson* applies to criminal cases. The SVP proceeding is civil, not criminal. *In re Young*, 122 Wn. 2d 1, 51-52, 857 P.2d 959 (1993).

Nor is there any reason the Court of Appeals should have reached this issue on appeal, as there is no evidence that Mr. Strand's commitment was founded on an involuntary confession or self-incriminating statements. In fact, there is nothing in the record even pointing to or suggesting evidence of self-incriminating statements made by Mr. Strand. Thus, the Court of Appeals appropriately did not address the issue of whether the right to a voluntariness hearing extends to SVP cases.

C. The Court Of Appeals Correctly Determined That Mr. Strand Received Effective Assistance Of Counsel.

The appellate court properly dismissed Mr. Strand's claim that his trial counsel's decision not to object to the pre-petition evaluation amounted to ineffective assistance of counsel. Mr. Strand cannot show that his trial counsel's actions were objectively unreasonable or would have changed the verdict.

Offenders subject to an SVP action have a statutory right to counsel during "all stages of the commitment trial". RCW 71.09.050. On review, there is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *In re Personal Restraint of Pirtle,* 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

In determining the effectiveness of counsel, courts apply a two part analysis. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Under this two part test, the burden is on Mr. Strand to establish that: (1) counsel's actions fell below the objective standard of reasonableness, and (2) that the deficient performance prejudiced the defendant "i.e., that there is a reasonable possibility that but for the deficient conduct the outcome of the proceeding would have differed." *Id.*. In applying the two part test, counsel is presumed effective. *Id.*

When an appellant alleges ineffective assistance of counsel due to a failure to object to the admission of evidence, the appellant must show that the trial court would likely have sustained the objection. *In re*

Detention of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Choosing not to object to a procedure proper under the superior court civil rules does not constitute ineffective assistance of counsel. *Id.*

The record in this case indicates that Mr. Strand's trial counsel took action within the standard of reasonableness of her profession. Mr. Strand argues that his counsel's failure to object to use of statements obtained at the pre-petition evaluation amounted to ineffective assistance of counsel. Petition at 11-12. As demonstrated above, the State had the authority to conduct the pre-petition evaluation and Mr. Strand consented to the evaluation after being warned that any statements made during the evaluation could be used at his SVP commitment hearing. *Supra.* Thus, Mr. Strand cannot show that it was likely that the trial court would have sustained the objection, and he has failed to demonstrate that review by this Court is warranted.

D. The Appellate Court Correctly Determined That Failure To Tape Record Mr. Strand's Expert Witness's Testimony Did Not Violate Mr. Strand's Constitutional Rights.

The Court of Appeals Correctly determined that the lack of a verbatim report of proceedings did not entitle Mr. Strand to a new trial.

It is well settled that Mr. Strand has no constitutional right to a verbatim report of proceedings. *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). Therefore, the question becomes whether the reconstructed record is sufficient for appellate review. *Id.* at 781.

Here, upon learning that the expert's testimony was not taped, the trial court acted quickly, asking each party to document their recollection of the testimony. RP at 15 (2/6/06). The parties created a twenty-one page narrative report detailing the expert's testimony and the trial court incorporated the expert's deposition testimony as well. RP at 38-39 (3/2/06); RP at 34-35 (3/3/06); CP at 38. Mr. Strand's trial counsel also conceded that nothing of significance was objected to during the course of the expert witness's testimony. RP at 6-7 (2/6/2006).

The Court of Appeals correctly determined that the reconstructed record was sufficient for appellate review. The trial court took every effort to preserve Mr. Strand's expert's testimony, and Mr. Strand failed to supplement the record to correct any deficiencies. Mr. Strand instead only made conclusory allegations that the record was incomplete. As Mr. Strand failed to demonstrate that the Court of Appeals decision regarding the sufficiency of the record constitutes error implicating constitutional rights, this Court should deny review.

V. CONCLUSION

The Court of Appeals properly concluded that Mr. Strand failed to raise any constitutional errors warranting review as to the pre-petition interview, was not entitled to a voluntariness hearing, was provided effective assistance of counsel, and the record was sufficient for appellate review. The Court's decision does not present a significant question of

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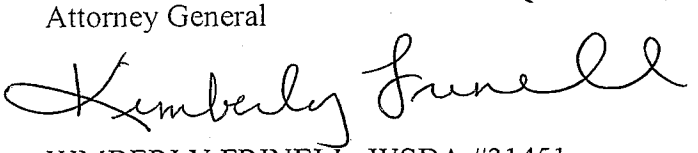
constitutional law or issue of substantial public interest, therefore, review is not appropriate under RAP 13.4(b). Review should be denied.

RESPECTFULLY SUBMITTED this 25th day of October, 2007.

ROBERT M. MCKENNA
Attorney General



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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN L. STRAND, Appellant.	DECLARATION OF SERVICE

I, Kimberly Sobol, declare as follows:

On October 25, 2007, I deposited in the United States mail true and correct copy of Answer to Petition to Review, postage affixed, addressed as follows:

Manek R. Mistry
Jodi R. Backlund
Backlund & Mistry
203 Fourth Avenue East, Suite 404
Olympia, WA 98501

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of October, 2007, at Olympia, Washington.

Kimberly Sobol
KIMBERLY SOBOL